Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

No. 93-1935

In the Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,
Petitioner,
v.
FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LESLIE D. MILLER
MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, INC.
1525 Wilson Boulevard
Suite 900
Arlington, VA 22209
(703) 841-9000

PETER BUSCEMI *
MARGERY SINDER FRIEDMAN
NEAL D. MOLLEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Counsel for Amicus Curiae Manufacturers Alliance for Productivity and Innovation, Inc.

* *Counsel of Record*

November 8, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

33 pp

QUESTIONS PRESENTED

1. Whether petitioner's health benefit plan, which reserved to the Company the right to amend the plan, complied with Section 402(b)(3) of the Employee Retirement Income Security Act, 29 U.S.C. § 1102(b)(3), which requires every employee benefit plan to "provide a procedure for amending [the] plan and for identifying the persons who have authority to amend the plan . . . ."

2. Whether, if petitioner's health benefit plan did not comply with Section 402(b)(3), this Court should apply the rule established in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721-22 (1978), *i.e.*, that when a newly-announced rule of law "represents a marked departure from past practice" in the administration of employment benefit plans, the ruling should not be applied retroactively unless Congress has plainly commanded that result.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	4
1. The Curtiss-Wright Plan	4
2. The District Court Proceedings	6
3. The Court Of Appeals Decision	7
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 402(b)(3) IS AT ODDS WITH THE LANGUAGE OF THE STATUTE, ITS PURPOSES, AND THE CONSTRUCTION IT HAS BEEN GIVEN UNIFORMLY BY THE INTERNAL REVENUE SERVICE AND THE BENEFITS COMMUNITY	11
II. AMENDMENTS PROMULGATED IN GOOD FAITH BASED ON LANGUAGE FUNCTIONALLY IDENTICAL TO THAT IN PETITIONER'S PLAN SHOULD BE ENFORCEABLE, NOTWITHSTANDING ANY PERCEIVED VIOLATION OF SECTION 402(b)(3)	17
A. Retroactively Invalidating Amendments Made In Good Faith Because Of Perceived Shortcomings In The Plan's Description Of Amendment Procedures Would Be Unwarranted	18
B. If This Court Adopts The Third Circuit's Construction Of Section 402(b)(3), It Should Do So Only Prospectively	20
CONCLUSION	28

TABLE OF AUTHORITIES

Cases Page

Adams v. Avondale Indus. Inc., 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) 18
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 26
Biggers v. Wittek, 4 F.3d 291 (4th Cir. 1993) 19
Fischer v. Philadelphia Elec. Co., 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993) 13
Florida v. Long, 487 U.S. 223 (1988) 10, 25, 26
Gordon v. Barnes Pumps, Inc., 999 F.2d 133 (6th Cir. 1993) 17
Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261 (S.D.N.Y. 1987) 27
Hessler Inc. v. Farrell, 226 A.2d 708 (Del. 1967) .. 15
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) ..... *passim*
Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan, 856 F.2d 1418 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989) 20
Moore v. Metropolitan Life Ins. Indus., Inc., 856 F.2d 488 (2d Cir. 1988) 17
Musto v. American Gen. Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) 13
Nachman Corp. v. PBGC, 446 U.S. 359 (1980) ..... *passim*
Stewart v. KHD Deutz of America Corp., 980 F.2d 698 (11th Cir. 1993) 17
United Mine Workers Health and Retirement Plan v. Robinson, 455 U.S. 562 (1982) 12
United Paperworkers Union v. Jefferson Smurfit Corp., 961 F.2d 1384 (8th Cir. 1992) 17
Westinghouse Elec. Corp. v. EEOC, 493 U.S. 801 (1989) 2
Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993) 17

Statutes

Employee Retirement Income Security Act,
29 U.S.C. § 1002(9) 7
29 U.S.C. § 1022(a) 15

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 1102(b) (3) ..... *passim*
29 U.S.C. § 1104(a) (1) (D) 22
Delaware State Code, 8 Del. Code § 141(a) 15

Miscellaneous

J. Castro, *Paging Dr. Clinton*, Time Magazine, Jan. 18, 1993 21
J. Chernoff, *Defined Contributions Soar: Assets To Surpass Defined Benefit Dollars By 2003*, Pension & Investments, March 22, 1993 21
Corbel Pension Plan Forms (Corbel & Co. 1992) 16
D. Dunkle, *Guide to Pension and Profit Sharing Plans: Taxation, Selection and Design* (McGraw-Hill 1991) 16
Economic Report of the President, February 1994: Annual Report of the Council of Economic Advisors, United States Government Printing Office (1994) 10
Employee Benefits and Regulatory Policy: Hearings *Before the Senate Committee on Finance*, 103d Cong., 2d Sess. (March 17, 1994) (available on LEXIS, News Library, FDCH file) 20
Employee Benefits: Company Actions to Limit Retiree Health Costs, United States General Accounting Office Report No. GAO/HRD-89-31BR (Feb. 1, 1989) 22
Pension and Profit Sharing, 2d ¶ 140,501 (.74) (RIA 1994) 16
Rabkin & Johnson, *Current Legal Forms* (M. Bender 1993) 16
Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System, United States Government Printing Office Report No. GAO/HRO-93-125 (July 1993) 22
U.S. Industrial Outlook, U.S. Department of Commerce, International Trade Administration (1993) 10

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1935

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is submitted by Manufacturers Alliance for Productivity and Innovation, Inc. ("Manufacturers Alliance" or "Alliance") as *amicus curiae* in support of petitioner.[1]

INTEREST OF AMICUS CURIAE

Manufacturers Alliance is a nonprofit research organization supported by some 500 manufacturing companies from a broad range of industries. These members range in size from relatively small, single-product manufacturers

---

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

with annual sales revenues in the $5 million-$50 million range to very large, highly diversified manufacturers and providers of business and technical services with annual sales revenues exceeding $1 billion. Roughly one-third of the Fortune Magazine 500 largest U.S. industrial companies are members of Manufacturers Alliance, including 23 of the companies ranked in the top 50. Petitioner in this case, Curtiss-Wright Corporation ("Curtiss-Wright"), is a member of the Alliance. The Alliance participated as *amicus curiae* in this Court in *Westinghouse Elec. Corp. v. EEOC*, 493 U.S. 801 (1989), in the court of appeals in *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174 (7th Cir. 1991), and before the National Labor Relations Board in *Electromation, Inc.*, 309 NLRB 990 (1992), *enf'd*, 147 L.R.R.M. 2257 (7th Cir. 1994).

The legal standards adopted by the court of appeals in this case call into question well-established employer methods of modifying employee benefit plans, and threaten the sound administration of the plans sponsored by the members of Manufacturers Alliance. Alliance members have substantial practical concerns about the result reached below. In October 1994, Alliance economist Patricia A. Buckley, Ph.D, conducted a survey of the Alliance's two Human Resources Councils—peer discussion groups comprised of many member companies' senior human resources executives. The survey revealed that, although nearly all have explicitly reserved the right to amend their benefit plans, more than 90 percent of the responding companies had at least one benefit plan with an amendment procedure likely to be held invalid under the unprecedented standard announced by the Third Circuit. Furthermore, 15 percent of those companies with potentially invalid plans maintain 50 or more employee benefit plans, and another 18 percent maintain between 20 and 49 plans each. More than half have made 20 or more changes to their benefit plans in the past five years, and over one-quarter have made more than 50

changes. Indeed, not a single respondent company indicated that it had made no changes to its plans. If the decision below is not reversed, each of those plan amendments will be suspect, and the fiduciaries who have administered those plans, in good faith, based on the written terms of those amendments, face the possibility of immense civil liability—and the near certainty of civil litigation. Indeed, three Alliance members have already reported lawsuits premised at least in part on the Third Circuit's decision in this case.

In an earlier survey of the Alliance's Human Resources Councils, compiled by Dr. Buckley in July 1994, 73 percent of the responding companies reported that they have amended their plans to reduce or terminate benefits provided to some group of active or retired employees. Fourteen of the 81 companies responding to that survey estimated that their potential liability to affected employees and retirees could exceed $10 million.

These potential liabilities are not the result of inattention or inadvertence by plan drafters, but rather arise from the court of appeals' unanticipated and unprecedented departure from long-established benefits practice. As explained in further detail below, the Internal Revenue Service and pension and welfare experts have long recommended that plan sponsors incorporate into their plans the amendment language condemned by the courts below or language functionally identical to it. Substantial, sophisticated corporate entities such as the members of Manufacturers Alliance (over one-half of the companies responding to the Alliance's surveys had annual sales in excess of $1 billion and more than 5,000 employees) have consistently relied on advice from the nation's experts on employee benefit plan design, and still they were unable to predict the peculiar approach that the court of appeals took in this case. Now, twenty years after enactment of the federal statute governing employee benefit plans, they, along with thousands of other employers, are exposed to

potential liability based on an unjustified set of judicially-imposed rules.

STATEMENT OF THE CASE

The Employee Retirement Income Security Act ("ERISA") generally permits the sponsor of an employee welfare benefit plan to amend or terminate that plan in whole or in part. This case concerns the proper interpretation and application of the statutory requirement that ERISA plans provide a procedure for making amendments. In its most immediate sense, the case involves the validity of an amendment to petitioner Curtiss-Wright's health plan and the sufficiency of the amendment provision in Curtiss-Wright's plan documents.

In a broader sense, however, this case has profound implications for employers, employees, and the American economy. The decision below threatens the reliability of amendments made over a 20-year period to literally millions of employee benefit and pension plans. The decision thus jeopardizes the viability of many of those plans—plans to which most Americans look for their health care, their retirement incomes, or both. The rule of law adopted by the court of appeals in this case, if permitted to stand, would impose unmanageable administrative burdens—and the potential for enormous civil liability—on the fiduciaries responsible for administering these plans and on the plans' employer sponsors. This draconian result cannot be justified by the terms of the statutory provision at issue, or the purpose for which it was enacted.

1. *The Curtiss-Wright Plan*

In response to the passage of ERISA, petitioner Curtiss-Wright established in 1976 an employee benefit plan "Constitution," which was intended to function as an umbrella document to govern the administration of several Curtiss-Wright employee benefit plans. The Constitution explicitly reserved to "[t]he Company . . . the

right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions" of the Constitution or the plans petitioner intended to create. Pet. App. 4a.

One of the benefit plans subject to this governing Constitution provided health benefits to some of the Company's employees and retirees. Periodically over the years, the Company amended the plan to account for changes in governing law, to reflect a change in the identity of the insurance carrier used by the plan, and for other reasons. To memorialize these changes, the Company periodically issued new Summary Plan Descriptions ("SPDs") to all of the participants and beneficiaries of the plan. Each SPD described the benefits available under the amended plan. Into each SPD—and a number of other communications sent to plan beneficiaries over the years—petitioner explicitly incorporated its right to amend the plan at any time.[2] Pet. App. 4a-5a.

In 1983, petitioner amended the plan again for a variety of reasons, including to reflect a change in the plan's insurance carrier and to insert the following language regarding the termination of retiree benefits: "Coverage under this Plan will cease for retirees and their dependents upon termination of business operations of the facility from which they retired." Pet. App. 5a-6a. Sometime thereafter, following the loss of a major defense contract, petitioner closed its facility in Wood-Ridge, New Jersey. Based on the quoted 1983 amendment to the governing plan document, petitioner then ceased to provide health benefits to those retirees who had last served the Company at the Wood-Ridge facility. This lawsuit ensued.

---

[2] From the record, it appears that none of these periodic amendments was challenged until the complaint was filed in this case.

2. *The District Court Proceedings*

A group of Curtiss-Wright retirees and retiree dependents brought this action on their own behalf and on behalf of a class of affected beneficiaries. They alleged, among other things, that their health benefits had become vested under ERISA and thus were not subject to termination. They also complained that Curtiss-Wright had not properly amended its health plan in 1983. After lengthy proceedings, the district court issued a number of findings regarding the pertinent plan documents and the 1983 amendments, most of which are not being challenged here.

First, the district court held that Curtiss-Wright had explicitly and effectively reserved the right to amend or terminate the health benefit plan on which plaintiffs relied. Pet. App. 40a. Second, the court ruled that plaintiffs' health benefits had not become vested under any legal theory. *See, e.g.*, Pet. App. 36a. Third, the court acknowledged that Curtiss-Wright, as a corporate entity, had attempted to amend its benefit plan in 1983 and had added to the SPD the language quoted above regarding termination of benefits. The court held, however, that the amendment was ineffective because it "was not effectively promulgated." Pet. App. 37a-38a.

The district court based this conclusion on Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), which requires that "[e]very employee benefit plan . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ." The court reasoned that the plan language establishing the right of "the Company" to amend the plan "at any time and from time to time" insufficiently delineated the details of the procedures the Company was to use in exercising this right. Thus, in resolving plaintiffs' claim to benefits, the court concluded that it was obligated to "look to the 1983 [SPD] without such amendment as the governing document." Pet. App. 38a. Because—absent

the amendment—plaintiffs were eligible for benefits under the plan, the court entered judgment in plaintiffs' favor for $2,681,086, the full value of plan benefits for each beneficiary measured from the time that benefits were terminated in 1984 through the date of the district court's ruling in 1990. Pet. App. 105a-106a.

3. *The Court Of Appeals Decision*

The court of appeals affirmed. First, it held that the language of Curtiss-Wright's plan, which reserved to "the Company" the right to amend the plan "at any time and from time to time" failed to identify "the persons who have authority to amend the plan." The opinion did not even mention the fact that a company or corporation is, by statutory definition, a "person" for purposes of ERISA. *See* Section 3(9), 29 U.S.C. § 1002(9). Pet. App. 7a-9a.

Second, the court of appeals agreed with the district court that the 1983 amendment was invalid due to procedural irregularities. The members of the panel differed, however, in their reasons for reaching this conclusion. For her part, Judge Roth conceded that the term "Company" as used in the plan's amendment provision necessarily implied a procedure for making an amendment, *i.e.*, that the term reasonably comprehended any "action taken by the board of directors or whomever of the company has the authority to take such action under the corporation law of the state of incorporation of the company in question." Pet. App. 8a-9a n.3. She concluded, however, that the amendment at issue was invalid because it was not the direct work product of the Curtiss-Wright board of directors. *Id.*

The majority was unwilling to go even this far. It ruled that the 1983 amendment was invalid because the plan provision authorizing amendments did not sufficiently detail the procedures that the amending "person" was supposed to follow in effecting an amendment. The court

gave no hint, however, as to precisely how detailed the required delineation of procedures would have to be to pass muster. The court's analysis of the statutory language at issue was largely confined to these sentences: "A simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan' . . . . A primary purpose of Section 402(b)(3) is to ensure that all interested parties will know how a plan may be altered . . . . The reservation in the Curtiss-Wright plan does not accomplish [this] objective[] and acceptance of Curtiss-Wright's argument would render requirements of Section 402(b)(3) essentially meaningless." Pet. App. 7a-8a.

The court was unwilling, however, to condemn *all* amendments made pursuant to amendment procedures that fail to meet the newly-announced standard. Rather, it declared that the only amendments that are invalid are those with terms that are "advantageous to the sponsor's interest"—a standard that the court did not explain in the opinion. Pet. App. 11a n.5. Finally, the court permitted Curtiss-Wright one "free bite" at an amendment under its allegedly defective amendment procedures, so long as it used that opportunity to rectify, prospectively, the perceived deficiencies in the plan's amendment provision. Pet. App. 11a.

SUMMARY OF ARGUMENT

I.

The court of appeals in this case combined an impractically broad reading of a portion of ERISA and an unjustifiably restrictive reading of the benefit plan language at issue to reach a result that, if generally adopted, would impose unmanageable administrative burdens on the vast majority of employee benefit plans in the United States. Even more troubling, the financial stability of many of these plans would be threatened by the rule adopted by the court of appeals.

Apart from these serious practical ramifications, the decision below is not well-grounded in either the text of the statute or its broader purposes. The rule of law announced by the court of appeals rests on an inappropriately literalistic reading of the language of Section 402 (b)(3) of ERISA and an inexplicable refusal to read that provision *in pari materia* with the related sections of the statute and the commonly accepted principles of corporate and trust law from which the statute evolved. Section 402(b)(3) requires that the relevant plan documents identify the "person" authorized to amend the plan and the procedure to be used in making an amendment. The plan at issue here identified the Company as the "person" with the power to amend—ERISA defines "person" to include corporations and thus explicitly permits a company to be the amending entity—and the plan language necessarily comprehended the procedure that the Company used in making the amendment. Any plan beneficiary reading the relevant plan language would have understood immediately that the Company had the power to amend the plan and would have recognized that the amendment at issue in this case reflected the Company's intent to exercise that authority. ERISA demands no more.

II.

Even if this Court were to adopt the unprecedented standard of specificity required by the Third Circuit, and to conclude that petitioner's plan drafters were insufficiently prolix when they reserved the Company's right to amend the plan, the Court should be reluctant to embrace the court of appeals' further conclusion—that any plan amendment "advantageous to the plan sponsor" promulgated pursuant to an inadequately described amendment procedure is necessarily void and unenforceable. This Court has previously noted on more than one occasion the mischief that can accompany the retroactive application of a new rule of law that fundamentally alters the requirements for administering employee benefit plans.

Indeed, the Court has broadly stated that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Florida v. Long*, 487 U.S. 223, 236 (1988), *quoting Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 720-23 (1978); *see also Nachman Corp. v. PBGC*, 446 U.S. 359, 368-69 (1980).

In this case, retroactive application of the Third Circuit's standard would pose administrative problems and potential liabilities so immense that they defy ready quantification. The great majority of employee welfare plans (such as health care plans) and a great many pension plans in use in the United States today operate—and have operated, since the passage of ERISA in 1974—under amendment provisions functionally identical to petitioner's. These plans have been amended with great regularity over the past two decades for a variety of reasons, frequently to bring them in line with the numerous changes in governing law and, in the case of health plans, to contain costs that have been rising sharply in recent years.[3] To ascertain what each amendment added or deleted; whether, on balance, that amendment was "advantageous to the plan sponsor;" which employees were affected by each change; and what the cost or value of each amendment might have been to each participant, would be a task of incalculable complexity. Moreover, many of the affected plans (including all of the affected pension plans) are funded in whole or in part with employer contributions

---

[3] Between 1985 and 1990, for example, the medical component of the Consumer Price Index ("CPI") rose at a 7.5 percent annual rate, a rate of increase nearly double the rate of increase of the CPI as a whole. *Economic Report of the President, February 1994: Annual Report of the Council of Economic Advisers*, United States Government Printing Office, table B-59, p. 335. By 1990, the average employer's share of medical and medically related costs per employee had surpassed $3100. *U.S. Industrial Outlook 1993*, U.S. Department of Commerce, International Trade Administration, at p. 42-2.

based on finely-tuned actuarial assumptions; the retroactive imposition of large unanticipated liabilities on these funds threatens their very existence. Accordingly, if this Court is inclined to adopt the Third Circuit's reading of Section 402(b)(3), it should do so prospectively only, grandfathering the amendment at issue in this case and all of those made prior to the date of this Court's decision.

ARGUMENT

I. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 402(b)(3) IS AT ODDS WITH THE LANGUAGE OF THE STATUTE, ITS PURPOSES, AND THE CONSTRUCTION IT HAS BEEN GIVEN UNIFORMLY BY THE INTERNAL REVENUE SERVICE AND THE BENEFITS COMMUNITY

In its very brief discussion of the issue, the court of appeals indicated that its conclusions regarding the meaning of Section 402(b)(3) were compelled by the language of the provision and its intended purpose. In fact, neither factor compels, or even significantly recommends, the construction adopted below.

The flaws in the Third Circuit's reasoning are most evident in the court's conclusion that despite advising interested readers that "the Company" was authorized to amend the plan, petitioner nonetheless failed to identify "the person" with the authority to amend. ERISA *explicitly* defines the term "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." Section 3(9), 29 U.S.C. § 1002(9). Since a "company" is, by definition, a "person" within the meaning of the statute, petitioner's plan language plainly named the "person" authorized to amend the plan; the court of appeals' contrary decision is inexplicable.

The decision below is similarly faulty with respect to the "procedure" requirement of the statute. The court of

appeals, declaring "that all interested parties [should] know how a plan may be altered and who may make such alterations," demanded that the plan document describe in detail the precise maneuvers required for corporate action. Pet. App. 8a. To be sure, a principal function of Section 402 is to permit plan participants and beneficiaries to determine what their benefits are and to assess the degree to which they may rely on those benefits in ordering their affairs. But anyone reading the language of the Curtiss-Wright plan would have known immediately that the benefits it provided were reliable only so long as the plan was not amended to change or eliminate them, that the Company reserved the right to make just this sort of amendment, and that it could do so at any time.

In a similar vein, respondents assert that Section 402 (b)(3) serves "the need for due process in the amendment of plan terms . . . ." Br. in Opp. at 10. The notion is fundamentally flawed. Section 402 does not purport to guarantee anyone "due process," but merely requires that whatever amendment method the sponsor intends to use be identifiable from reading the plan document. No opportunity to be heard is required, and the statute does not establish any procedural minimums. Indeed, even under the Third Circuit's decision, a plan could permit the company president to make amendments for any reason or no reason at all, as long as the plan provided a sufficiently detailed description of whatever "procedures" the president would use in doing so. Similarly, ERISA imposes no standards for evaluating the wisdom or logic of a plan amendment. In amending a plan, an employer acts as a settlor, not a fiduciary. It thus has the freedom of choice accorded a settlor in determining who will receive benefits and what benefits will be provided. Considerations of "substantive due process" play no role in evaluating plan amendments under the statute. *Cf. United Mine Workers Health and Retirement Plan v. Robinson*, 455 U.S. 562 (1982) (ERISA does not permit courts to police collectively bargained terms of health

benefits plan for "reasonableness"); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993); *Musto v. American Gen. Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) (employer is not acting as fiduciary in deciding the terms of a plan; employer may terminate plan or benefits previously available to certain beneficiaries without violating ERISA's fiduciary standards), *cert. denied*, 490 U.S. 1020 (1989).

It is unclear precisely what the court of appeals believed the "procedure" clause of Section 402(b)(3) to mean. Petitioner's document identified the party with the power to amend ("the Company"), and the time at which the Company could act ("at any time and from time to time"). Moreover, given Section 402(a)'s explicit command that the terms of the plan be in writing, beneficiaries plainly knew *how* amendments were to be made, *i.e.*, in writing. It will be difficult for an employer to know how to comply with the Third Circuit's standard, while still retaining the flexibility to which it is entitled under ERISA. To be sure, the employer could vest the amendment power in a single office or entity (such as a pension committee or the board of directors), but such a provision would restrict the employer's freedom of action in a way that is not compelled by the statute. Conversely, the employer could undertake to list each method by which it might conceivably choose to act at some point in the future, but the resulting amendment procedure would be cumbersome at a minimum and would do little to provide beneficiaries and participants with the notice that apparently motivated the decision below.

Moreover, the "procedure" requirement of Section 402(b)(3), by its terms, relates only to *amendments*, not to plan terminations, and the court of appeals conceded that petitioner lawfully could have terminated the entire plan and established a new one for which respondents were not eligible, all without implicating Section 402(b)(3). Pet. App. 12a. Thus, adding more detail to the amend-

ment procedures as required by the court of appeals would do nothing to increase the permanence or "reliability" of the benefits contained in the plan, would guarantee no hearing to plan beneficiaries, and would not limit in any practical sense the prospective freedom of plan sponsors to reduce or eliminate benefits.

Nor is there any basis for Judge Roth's assertion that the amendment at issue in this case was not an action taken by "the Company." As Judge Roth recognized, a corporation is not a corporeal entity; it acts—can act—only through its officers, agents, and employees. Thus, when an interested reader of the relevant plan documents sees that "the Company" is empowered to make plan amendments, he or she knows that the benefits the plan provides may be changed or eliminated whenever "the Company" acts in accordance with its existing structure of corporate governance. Here, Curtiss-Wright's officers and agents promulgated the amendment at issue, as they had promulgated the 1976 plan Constitution and the subsequent SPDs and plan-related documents. Although Judge Roth condemned the 1983 amendment because it was not the direct work product of the Curtiss-Wright board of directors, petitioner, respondents, and the district court *all* agree that petitioner's board of directors had *never* acted on these sorts of issues in the past, but rather that authority for plan matters had been delegated to some of the Company's executives.[4] There can be no disagreement: 1) that petitioner intended to act as "the Company," through its agents, in amending the plan;

---

[4] Petitioner argues that this amendment, and all its prior amendments, were made by its Corporate Director of Benefits and its Labor Counsel with the approval and authorization of its Executive Vice President. Pet. 5. Respondent maintains that a working committee of Company executives—including these same three individuals—had approved petitioner's prior amendments. Pet. App. 38a; J.A. 73-74. The district court did not resolve this dispute, simply noting that the evidence "suggested" that respondent may have been correct. *Id.* In any event, it is agreed that the board of directors was never involved.

2) that, in the past, it had relied on these (or other) agents for performing the same tasks; 3) that the relevant corporate law authorizes it to act in this fashion;[5] or 4) that the beneficiaries and participants of the plan understood the amendment to be the act of the Company.

The fact that the relevant provision of ERISA appears in Section 402 of the Act, rather than in Section 102, underscores the dubious character of the court of appeals' central thesis—that explication of detailed amendment procedures is necessary to disclose important substantive rights to participants and beneficiaries. Section 102 requires that the plan sponsor publish and distribute a Summary Plan Description for each of its plans containing a litany of required items intended "to reasonably apprise [the] participants and beneficiaries of their rights and obligations under the plan." Section 102(a), 29 U.S.C. § 1022(a). Section 102 further commands that the SPD be drafted in language "calculated to be understood by the average plan participant . . . ." The "procedure" requirement of Section 402(b)(3) is conspicuously absent from the list of items required for inclusion in the SPD, and, in fact, the amendment procedures are frequently contained in plan documents that most beneficiaries never see. Had Congress viewed the amendment procedures requirement as a substantive right—or even a significant procedural one—it seems quite likely that it too would have been listed in the text of Section 102.

Of equal, if not greater, importance, twenty years of experience under the Act demonstrate the idiosyncratic nature of the decision below. The Internal Revenue

---

[5] *See* 8 Del. Code § 141(a) (corporation to be managed "by *or under the direction of* a board of directors") (emphasis added); *Hessler Inc. v. Farrell*, 226 A.2d 708 (Del. 1967) (actions of corporate officer with respect to retiree benefits were within his authority, and direct action by board of directors on the matter was not required to form enforceable obligation; officer's authority to act need not be explicitly granted by board).

Service, for example, has for some time approved prototype plan documents for use by pension plan drafters. Its approved "sample plan" amendment language merely provides that "[t]he sponsoring organization may amend any part of the plan." *See* 7 *Pension and Profit Sharing*, 2d ¶ 140,501(.74), at 140,573 (RIA 1994). Benefits treatises and commercial loose-leaf services in the pension area recommend amendment language no more particularized. David Dunkle's *Guide to Pension and Profit Sharing Plans: Taxation, Selection and Design* suggests the following: "[t]he employer reserves the right to amend the Plan at any time and in any respect . . . ." *Id.* at App. A-27 (McGraw-Hill Oct. 1991); *see also* 5A Rabkin & Johnson, *Current Legal Forms* (M. Bender 1993) at 13-1081 ("The Plan may be amended . . . by the Company"); *Corbel Pension Plan Forms* (1992) at DB-8-301 ("The Employer shall have the right . . . to amend the Plan . . . .").

Even among the nation's largest employers, which consistently utilize the most sophisticated legal advice available, language of the sort condemned by the court of appeals is commonplace. In its October 1994 survey, the Alliance found that *more than 90%* of the responding companies have sponsored at least one employee benefit plan containing language that would be unlikely to satisfy the court of appeals' standard. And these companies have liberally amended their plans, in reliance on the amendment provisions now cast in doubt by the Third Circuit's decision. Indeed, more than half of the responding companies with potentially invalid plans have made 20 or more changes in the past five years; more than a quarter have made 50 or more changes. Likewise, in its July 1994 survey, the Alliance found that almost three-fourths of the responding companies had relied on their reserved amendment powers to reduce or terminate particular benefits.

The conclusions reached by the court of appeals were neither required by the text of the statute nor consistent with its purpose. The federal government, plan designers, plan sponsors, and, to the extent they were aware of the procedures requirement at all, plan beneficiaries have all given the relevant statutory language a contrary construction for two decades.[6] This Court should follow, rather than frustrate, their settled expectations.

II. AMENDMENTS PROMULGATED IN GOOD FAITH BASED ON LANGUAGE FUNCTIONALLY IDENTICAL TO THAT IN PETITIONER'S PLAN SHOULD BE ENFORCEABLE, NOTWITHSTANDING ANY PERCEIVED VIOLATION OF SECTION 402(b)(3)

The Third Circuit moved directly from its ruling that petitioner's plan failed to satisfy Section 402(b)(3) to the conclusion that substantially all amendments made to the plan since its inception were necessarily void. It

---

[6] Although plan beneficiaries have challenged plan amendments in many cases, and although in many of those cases the amendments were made pursuant to plan provisions that would not satisfy the Third Circuit's standard, the arguments advanced here by respondents apparently never even occurred to the plaintiffs, their lawyers, or the courts in the earlier litigation. No challenge based on Section 402(b)(3) appears in any of those cases. *See, e.g., Moore v. Metropolitan Life Ins. Indus., Inc.*, 856 F.2d 488 (2d Cir. 1988); ("The Company . . . reserves the right to change or discontinue any portion of the benefits" in the plan); *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992) ("the plan administrators reserved the right 'to terminate, suspend, withdraw, amend or modify the Plan at any time' "); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993) ("the Company reserves the right to alter, amend, delete, cancel or otherwise change the plan . . . at any time"); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993) ("The Company reserves the right to modify, suspend or terminate the Plan, at any time and for any reason"); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.) ("the Company shall have the right . . . to amend, modify, suspend or discontinue the Plans"), *cert. denied*, 114 S. Ct. 196 (1993).

reached this result without any analysis whatever, as if an answer to the "liability" question automatically resolved all questions of remedy. Other appellate courts have seen the matter quite differently and have been unwilling to provide participants with an unanticipated benefits bonanza based on inadvertent procedural missteps by plan sponsors. Even if the Court is unwilling to declare such a retrospective reinstatement of benefits an inappropriate remedy in all circumstances for the kind of ERISA violation alleged here, the Court should, at minimum, apply to this case the general rule previously announced by the Court for new legal principles applicable to employee benefit plans, and on that basis should give any new standards announced here prospective effect only. We discuss each of these points below.

A. Retroactively Invalidating Amendments Made In Good Faith Because Of Perceived Shortcomings In The Plan's Description Of Amendment Procedures Would Be Unwarranted

The Fourth and Sixth Circuits have concluded that an employee benefit plan's failure to satisfy the requirements of Section 402(b)(3) does not render invalid all plan amendments. Under the rules established in those courts, amendments made in good faith, with no attempt to mislead or conceal, are enforceable, at least where the beneficiaries have no justifiable claim to detrimental reliance. In *Adams v. Avondale Indus. Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), the employer substantially limited the scope of its prior, unwritten severance practices by promulgating a written, less generous severance plan. The parties stipulated that the employer's unwritten historical practices constituted an ERISA welfare plan, and the court concluded that the more recent written document was an amendment to it. Because the prior unwritten practices necessarily failed to specify the entity with authority to amend the plan or the procedures to be used in making such amendments, the

plaintiffs relied on Section 402(b)(3) in arguing that the written amendment was invalid. The court rejected the claim, concluding that in the absence of evidence of detrimental reliance by the plaintiffs, it would "decline to impose the substantive remedy of prohibiting plan amendments in response to defendant's procedural violations." *Id.* at 949.

In *Biggers v. Wittek Indus. Inc.*, 4 F.3d 291 (4th Cir. 1993), the employer had a written plan but had failed altogether to reserve to itself the right to amend it. Nonetheless, the court enforced the terms of an amendment made by the employer, holding that "in the absence of provisions in a plan that provide procedures for amendment, a writing amends a plan [if it is] accompanied by a clear manifestation of an intent to alter the policy or plan." *Id.* at 296.

Curtiss-Wright's amendment easily satisfies the standards articulated in these cases. The Company acted in good faith through its executives to amend its plan, and, in view of the plan's explicit statement that the terms could be amended at any time by the Company, no showing of detrimental reliance would be possible. Indeed, one could stop well short of the actual holdings in *Biggers* and *Adams* and still conclude that the plan amendment at issue here was valid. In those two cases, it was at least possible that interested plan participants could have inferred from the silence of the plan sponsor that its historical practices were not subject to change; certainly there was nothing in the terms of the plans that would have alerted beneficiaries that amendment was possible.

Here, by contrast, a beneficiary of petitioner's plan would have recognized immediately that his benefits were subject to reduction or elimination by the Company, acting unilaterally, "at any time and from time to time." The Company plainly intended to amend the plan through its executives, and their work product was viewed by all

interested parties as action "by the Company." Against this background, there is little basis for the Third Circuit's conclusion that the plan's failure to describe amendment procedures in sufficient detail to satisfy the court's newly-announced interpretation of Section 402(b)(3) automatically renders invalid all prior amendments "advantageous to the sponsor's interest." Nothing in the statute compels this draconian result, and the Court should not accept it as the necessary consequence of the Third Circuit's peculiar construction of Section 402(b)(3).

B. If This Court Adopts The Third Circuit's Construction Of Section 402(b)(3), It Should Do So Only Prospectively

The Third Circuit apparently believed that its opinion made only an incremental change in the interpretation of a single subsection of ERISA, a "comprehensive and reticulated statute . . . ." *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). For the reasons already explained, however, the Third Circuit's modest view of its handiwork is an illusion. The court's ostensibly marginal exercise in statutory construction will have seismic consequences for employee benefit plans and their fiduciaries if it is used to assess the validity of amendments made over the 20-year life of ERISA.[7] And, given the importance of these plans to the national economy and the lives of employees, retirees, and their dependents, it is difficult to overstate the consequences that

[7] To be sure, the applicable statute of limitations will limit the extent of fiduciary liability based on the new rule. But it is entirely likely that plan participants denied coverage within the statute of limitations, based on older amendments made outside of the statute of limitations pursuant to "defective" plan amendment procedures, will argue that they are entitled to recover. *Cf. Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989) (statute of limitations for alleged underpayment of pension begins to run for each monthly payment with the issuance and receipt of monthly check).

would attend widespread application of the rule announced below.

Even in the mid-1970's, when pension, health, and welfare benefits were still referred to dismissively as "fringe benefits," employee pension assets accounted for more than $400 billion of investment in the national economy. *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 721 (1978). As of 1992, the figure was closer to $2.48 trillion. Joel Chernoff, *Defined Contribution Soaring; Assets To Surpass Defined Benefit Dollars By 2003, Pension & Investments,* Mar. 22, 1993, at p. 1. It is commonly agreed that health services account for roughly one-seventh of the national economy, the great bulk being funded by employment-based health insurance. *Employee Benefits and Regulatory Policy: Hearings Before the Senate Committee on Finance,* 103d Cong., 2d Sess. (March 17, 1994) (available on LEXIS, NEWS library, FDCH file) (Testimony of Christopher W. O'Flinn); Janice Castro, *Paging Dr. Clinton,* Time Magazine, Jan. 18, 1993, at p. 24.

Clearly, then, any change in governing law that retroactively alters the allocation of scarce resources among providers, insurers, and beneficiaries in these areas threatens serious repercussions for the nation's economy. The rule announced by the Third Circuit would produce such a result. As noted earlier, *most* health and welfare plans, and a great many pension plans, have relied for years on amendment provisions functionally identical to the one condemned below. Better than 90 percent of the Alliance members that responded to the recent survey sponsor at least one plan with amendment language similar to that contained in the Curtiss-Wright plan. Many of these employers have sponsored multiple plans; a third of them have sponsored more than 20 such plans, with nearly half of that group having sponsored more than 50 such plans. More than 70 percent of those responding to the earlier survey have relied on their reserved right to amend their

benefit plans to reduce or terminate benefits. The experience of Alliance members in this regard is replicated in the economy as a whole. *See Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System,* United States General Accounting Office Report No. GAO/HRD-93-125 (July 1993) (reporting, based on five separate studies, that as many as 93% of employers have "changed their retiree health benefit plans over the past few years"); *see also Employee Benefits: Company Actions to Limit Retiree Health Costs,* United States General Accounting Office Report No. GAO/HRD-89-31BR (Feb. 1, 1989).

It is apparent from the court of appeals' decision that the court gave little consideration to the administrative consequences of its holding. Fiduciaries are statutorily obligated to administer their plans according to their written terms. *See* Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D). The Third Circuit concluded that, for plans with amendment provisions like Curtiss-Wright's, those terms include only the plan as initially established and any amendments not "advantageous to the plan sponsor." Accordingly, to comply with the rule of decision below, every plan administrator will be obligated first to identify each amendment made over the past 20 years (a daunting task in itself) and then to determine whether the amendment was advantageous to the sponsor. This inquiry will not yield self-evident results. Will an amendment adopting a "cafeteria"-type plan allowing employees the opportunity to select from a menu of benefits in lieu of a single "one-size-fits-all" benefits package for all employees, be regarded as valid under this rule if the net result was a cost savings to the sponsor? Will an amendment that terminates dental coverage, but adds vision and auditory-aid coverage be enforceable? Will substitution of an HMO-style plan in place of an indemnity plan be valid if it limits choice of primary care physicians but adds well-visit and pediatric vaccination coverage? Will the validity of these changes

depend on whether they are revenue-neutral to the employer? If these amendments are deemed "advantageous to the sponsor" and thus subject to the new rule of law, will the liability of individual fiduciaries be offset by the value added by the amendments, *e.g.*, deducting from the value of the deleted dental care the value of the added vision care? Should the fiduciaries calculate their liability by analyzing the actual expenses of individual participants and determining the effect of each amendment, or by determining an aggregate or average cost of each amendment to participants in general (the damage computations in the courts below suggest the former)?

An employer's burden would not stop at its health plans, of course. A similar analysis would have to be performed for each ERISA-covered plan sponsored by each employer. An employer that sponsors multiple plans—many Alliance members have 50 or more—would have to take the foregoing steps for each amendment and for each pension, profit sharing, life insurance, severance, vacation, employee stock ownership, or other plan it may offer.

Assuming that the fiduciaries have unerringly classified all of the amendments (and thus know what the enforceable terms of the plan are); that the plan has not destroyed the archival records from which former participants can be identified; and that a value has been determined for each of the interrelated, now-invalid amendments, the fiduciaries will have to find the money to fund the "back benefits" that the court of appeals decision appears to require. In some instances, sponsoring employers will be obligated, or will choose, to pay the additional cost of compensating beneficiaries for past benefits, perhaps by withholding other planned improvements in wages or benefits. Yet some employers may have concerns about retaining employees with scarce and highly marketable skills if planned improvements in wages or benefits are not implemented for those employees. This

may cause the least skilled (and lowest paid) employees to bear the cost of any needed changes.

In many other cases, however, the employer's obligation to fund the relevant pension or welfare benefits is fixed, *e.g.*, as a function of hours worked. In these instances, the allocation of benefit dollars is a zero-sum game. For every plan dollar used to reimburse a retiree, for example, for dental care—services that both the plan and the beneficiary believed had been deleted years ago—there will be one less dollar available to pay for hospitalization for a current employee or his or her dependents. Thus, while employers have frequently attempted to cope with rising health costs by eliminating less important or less expensive items from coverage, the effect of the Third Circuit's ruling would be to shift the finite dollars available for coverage *from* the core medical needs covered by the amended plans *to* these more marginal aspects of the plan.

Although it is apparent that the court of appeals gave little or no thought to these practical consequences of its ruling, it did recognize, at least implicitly, the conundrum employers with plans like Curtiss-Wrights' would face *prospectively* if the court's opinion were carried to its logical conclusion. The court permitted Curtiss-Wright "one free bite" at amending its plan to cure the perceived defect under Section 402(b)(3) and thus to allow for future amendments. Of course, this "curative amendment" exception had no textual basis in the statute and its logic seems irreconcilable with the opinion as a whole. The exception serves, however, as a tacit recognition of the prospective problems posed by the decision; it also highlights the failure of the court even to consider the practical impact the ruling would have on plan amendments made over the previous two decades.

On several occasions, however, this Court has changed the fundamental legal rules underlying the operation of pension plans and has dealt in a comprehensive and sensible way with all of the consequences of those decisions.

In *Manhart*, for example, this Court announced that Title VII of the Civil Rights Act of 1964 prohibited the then-prevailing practice of requiring women to make larger contributions to a pension fund than male employees in order to receive the same benefit. In announcing this new rule of law, however, the Court recognized the destabilizing impact the rule would have if applied retroactively:

> [Pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. Risks that the insurer foresees will be included in the calculation of liability and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, *the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.*

Manhart, 435 U.S. at 721 (emphasis added). As the Court recognized, this concern for stability was a central focus of the design of ERISA; "Congress [has], in fact, stressed the importance of 'making only gradual and prospective changes' in the legal rules governing pension plans . . . ." *Florida v. Long*, 487 U.S. 223, 236 (1988), *quoting Manhart*, 435 U.S. at 721-22 n.40 (noting the "careful attention [paid by Congress] to the problem of retroactivity" in enacting ERISA); *accord, Nachman Corp. v. PBGC*, 446 U.S. 359 (1980).

The Court in *Manhart* noted that "[a]lthough we have no doubt about the application of [Title VII] in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the extensive briefs and arguments presented to us, may well have assumed that [the use of sex-linked mortality tables] was entirely lawful." 435 U.S. at 720. Because the

Manhart decision represented such a "marked departure from past practice," and resolved conflicting positions taken on the subject by the relevant federal agencies, the Court felt obligated to give "administrators of retirement plans time to adjust . . . ." *Id.*

The same principle was applied again in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) (*per curiam*). *Manhart* held sex-based differences in pension contributions unlawful; *Norris* challenged an employer's decision to offer an annuity plan that required equal contributions from men and women but paid reduced benefits to women, again based on sex-linked mortality tables. The Court held these plans unlawful as well, but again concluded that imposing this standard retroactively "would be both unprecedented and manifestly unjust." *Id.* at 1105 (opinion of Powell, J. joined by Burger, C.J., and Blackmun and Rehnquist, J.J., and, in relevant part, by O'Connor, J.). Although the Court had addressed the relationship between Title VII and sex-linked mortality tables at great length in *Manhart*, the *Norris* Court found that "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities [with sex-differentiated payouts] offered by insurance companies on the open market." *Id.* at 1106. Because the *Norris* opinion represented a significant extension of *Manhart*—an extension conscientious plan administrators may not have anticipated—the Court applied its new rule prospectively only.[8]

---

[8] Although *Manhart*, *Long*, and *Norris* all involved pension annuities, the provisions of ERISA cited by the *Manhart* Court as evincing the "careful attention [paid by Congress] to the problem of retroactivity" related both to pension *and* welfare plans. *Manhart*, 435 U.S. at 721-72 n.40. Similarly, although *Manhart*, *Norris*, and *Long* involved allegations of sex discrimination under Title VII, both this Court and the lower courts have recognized that the proscription against retroactive application of new rules of law in the employee benefits area applies as well outside the context of Title VII cases. *See, e.g., Nachman Inc. v. PBGC*, 446 U.S. 359, 367 (1980) (in case involving interpretation of ERISA pension

In this instance, there were no conflicting opinions from federal agencies like those in *Manhart*, and no prior court decisions even hinting that an amendment provision like that in the Curtiss-Wright health benefit plan might be defective. The IRS, the benefits experts, and the treatises all agreed that the language petitioner used met the requirements of the statute. Conscientious and sophisticated plan administrators in fact *did* believe, universally, that the language condemned in the decision below satisfied the statutory standard. In this sense, the Third Circuit's decision represents a far more acute departure from prior plan administration experience than did the rulings in *Manhart* or *Norris*. For this reason, if the Court finds that the Curtiss-Wright plan did not adequately describe its amendment procedures, the Court should announce its new principle of law prospectively only and permit employers time to bring their plans into compliance with the new standards. At the same time, the Court should declare that amendments made prior to the date of the decision in this case should not be found invalid or unenforceable based on the failure of plan amendment language to satisfy any new rule that may be established here.

---

provision, this Court recognized "that new rules applying to pension funds 'should not be applied retroactively unless the legislature has plainly commanded that result'") (quoting *Manhart*, 435 U.S. at 721); *Helm v. South African Airways*, 44 Fair Empl. Prac. Cas. (BNA) 261 (S.D.N.Y. 1987) (Age Discrimination In Employment Act case; refusing retroactive application of extraterritoriality provision of statute to pension fund, citing *Manhart*).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

LESLIE D. MILLER
MANUFACTURERS ALLIANCE
FOR PRODUCTIVITY AND
INNOVATION, INC.
1525 Wilson Boulevard
Suite 900
Arlington, VA 22209
(703) 841-9000

PETER BUSCEMI *
MARGERY SINDER FRIEDMAN
NEAL D. MOLLEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

Counsel for Amicus Curiae Manufacturers Alliance for Productivity and Innovation, Inc.

* *Counsel of Record*

November 8, 1994